Filed 5/10/10 Platino Records v. Univision Music CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PLATINO RECORDS, INC., et al., Plaintiffs and Appellants, v. UNIVISION MUSIC, LLC, et al., Defendants and Respondents.	B212336 (Los Angeles County Super. Ct. No. BC 375405)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jane L. Johnson, Judge. Affirmed.

Coggan & Tarlow, Jay M. Coggan, David N. Tarlow and Jessica N. Trotter for Plaintiffs and Appellants.

Kirkland & Ellis, R. Alexander Pilmer, Xanath McKeever and Sasha K. Danna for Defendants and Respondents.

* * * * * *

Appellants Platino Records, Inc., and Solmar Music, Inc., doing business as Editora Solmar, Marisol Music and Mas Solmar Music, brought an action against respondent Univision Music, LLC, doing business under various Univision titles.[1] We will refer from time to time to appellants collectively as Platino and to respondents as Univision. The action was in substance for breach of contract. Univision moved for summary judgment. We affirm the trial court's order granting summary judgment.

Univision has moved for an order imposing sanctions on Platino for taking and prosecuting a frivolous appeal. We agree that Platino's contentions on appeal are marginal. Under *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, however, it cannot be said that the appeal is frivolous.

THE COMPLAINT

The complaint alleges that on January 1, 2005, Platino and Univision entered into a Record Distribution Agreement (Distribution Agreement) under which Univision agreed to distribute no less than 50 previously unreleased phonograph records produced by Platino. The Distribution Agreement had a term of four years. Under the Distribution Agreement, Univision agreed to pay Platino a monthly advance of $200,000 recoupable from future royalties. Although the Distribution Agreement was entered into in 2005, Platino and Univision had been doing business since November 1996.

Prior to entering into the Distribution Agreement, appellant Solmar Music, Inc. (Solmar), and some Univision entities[2] entered into an "Administration Agreement" under which the Univision entities undertook to administer Platino's publishing. The purpose of the Administration Agreement was to allow Univision to recoup one-half of the payments made under the Distribution Agreement.

In or about December 2005, Univision directed one of its employees, Daniel Mireles, to offer to pay radio stations if they played records, a practice referred to as "payola." In

---

[1] They are Univision Records and Fonovisa Records; Univision Songs, Inc.; Songs of Univision, Inc.; and Univision Melodies, Inc.

[2] Univision Songs, Inc.; Songs of Univision, Inc.; and Univision Melodies, Inc.

January 2006, Alberto Mitchell, Platino's president, learned of the payola and demanded its cessation. Univision complied with this request and fired Mireles, who sued Univision for wrongful termination. Univision "became concerned that Mr. Mitchell knew too much about their payola scheme, and that he would be a witness against them in any suit by Mr. Mireles."

Univision decided to "extort [Platino] into being silent." Univision "intentionally reduced the marketing and distribution of the product provided by [Platino] such that the sales by Univision . . . would not be sufficient to cover the monthly $200,000.00 advance." The intent was to put Platino into debt so as to agree with Univision's "demands." Platino's debt in fact increased and Univision demanded higher payments under the Administration Agreement. All this was done to demonstrate that Univision "had the ability to crush [Platino] financially if Mr. Mitchell did not cooperate." "In response to this economic coercion," Platino entered into an amendment of the Distribution and Administration Agreements on July 17, 2006.

The complaint sets forth five causes of action.

The first cause of action for breach of contract alleges that Univision breached the Distribution Agreement "in that it has failed to market and distribute the albums provided by Platino for distribution. [Univision] has further failed to account in a timely manner to [Platino]."

The second cause of action for breach of the covenant of good faith and fair dealing alleges that Univision "intentionally" failed to market and distribute Platino's product or dumped the product "at bottom line prices."

The third cause of action is for an accounting for sums allegedly due Platino.

The fourth cause of action alleges that Univision's failures regarding Platino's product was "economic extortion" to prevent Mitchell from testifying about the payola in Mireles's action against Univision.

The fifth cause of action sought a declaration that the amendment of July 17, 2006, to the Distribution Agreement is of no force or effect.

THE DISTRIBUTION AGREEMENT

Under the Distribution Agreement, Platino granted Univision the exclusive right to distribute Platino's records throughout the United States; Platino undertook to deliver to Univision in each of the four years of the contract term no fewer than 50 previously unreleased record albums. Univision was to pay Platino royalties from the sales by Univision of Platino records. Univision undertook to pay Platino $200,000 per month as an advance that would be recouped by Univision as credits against royalties owing to Platino. We note here parenthetically that, under this structure, it was in Univision's interest to sell Platino records in that this was the means by which it could recoup its advances.

Paragraph 2. of the Distribution Agreement provided in part that distribution services under the Distribution Agreement "shall include solicitation and servicing of accounts, acceptance, and processing of orders from customers, physical distribution, . . . invoicing of and collection from customers, and issuance of credits."

The Distribution Agreement gave Platino the right to examine the books and records maintained by Univision for the purpose of calculating royalties due Platino.

Paragraph 9. of the Distribution Agreement, entitled "PLATINO'S OBLIGATIONS," states in relevant part that "[n]otwithstanding any other provision of this Agreement to the contrary, Platino shall be solely responsible for, and shall pay all costs associated with, all of the following: . . . (d) creating and preparing all marketing, advertising, publicity and promotional materials and arranging for and conducting all marketing, advertising, publicity and promotional activities (including without limitation so-called 'independent promotion') in connection with all of Platino's Records delivered hereunder . . . ."

Paragraph 10., entitled "TRADEMARKS AND RIGHTS," first provided that Platino was the exclusive owner of all trademarks, trade names and logos used by Platino in connection with its records. Paragraph 10.(b) states in relevant part that, in the performance of services under the Distribution Agreement, "Univision shall have the exclusive right in the [United States]: (i) to advertise, distribute and sell, on behalf of Platino, Platino's Records in the [United States] and to cause others to do so . . . ."

Finally, paragraph 15.(d) stated that "Univision shall not be in default of any term, condition, or provision of this Agreement unless and until Platino shall give Univision written notice specifying such default in detail and such default, if curable, shall not have been cured within thirty (30) days after receipt of such notice." Platino was given the identical right.

Platino never gave Univision notice of a default under paragraph 15.(d).

DISCOVERY RESPONSES

Platino admitted that the Distribution and Administration Agreements are unambiguous and enforceable.

It appears that, as a general matter, sales of Latin music declined between 2005 and 2008. Univision's and Platino's sales declined as part of this development. Platino reports that its sales in this period declined by 90 percent while the general decline in sales was 72 percent.

Platino admitted that Univision "did not fail to distribute Platino's records" in the years 2006, 2007 and 2008.

Platino admitted that it regularly received royalty reports from Univision, that the amount of royalties due was never disputed and that it has been paid everything that it is entitled to receive.

Significantly, Platino also admitted that it had a good business relationship with Univision and that Univision's representatives were completely trustworthy.

It is evident that these admissions largely, if not completely, strip Platino's case of any substantive merit.

DISCUSSION

1. Paragraphs 9. and 10. of the Distribution Agreement Are Not in Conflict

Platino contends that under paragraph 10. "Univision is the only party with the exclusive right to advertise in the territory,"[3] therefore Platino cannot be responsible for

---

[3] The "territory" under the Distribution Agreement is the United States and its possessions.

marketing; yet, under paragraph 9.(d), Platino is solely responsible for marketing. Platino contends that this alleged conflict renders the Distribution Agreement ambiguous and that this court should resolve this ambiguity by holding that paragraph 10. supersedes paragraph 9.

The premise of this contention is mistaken; there is no conflict between paragraphs 9. and 10. The right to advertise, distribute and sell Platino's records was a right that Platino could assign, grant or sell to another party; here, it chose to grant it exclusively to Univision. At the same time, Platino and Univision could agree, as they did, that the responsibility (and costs) of marketing were to be Platino's responsibility. This left Univision in the position of being able to decide whether or not it would advertise Platino records; Univision might well decide not to do so. Nor is it true that advertising and marketing is the same. Marketing is a much broader concept than advertising; marketing includes many other functions in addition to advertising. Thus, there simply is no conflict between paragraphs 9. and 10.

2. Platino Has Failed to Show That Univision Was Required to Market Platino's Records

Platino contends that under the Distribution Agreement Univision was required to market the records and that Univision failed to do so. We conclude that under the Distribution Agreement, Platino, and not Univision, was required to engage in marketing.

Platino cites paragraph 2. of the Distribution Agreement that grants Univision the exclusive right to "distribute, and authorize others to distribute" Platino's records. Platino claims that this "plain language" required Univision "to undertake duties which in and of themselves constituted 'marketing' duties."

While it is true that the quoted language from paragraph 2. is plain, it is not true that the grant of the exclusive right to distribute carries with it the duty to market the product being distributed. Distribution and marketing are markedly different activities. It is perfectly possible for a distributor not to be engaged in marketing the product being distributed.

Paragraph 2. of the Distribution Agreement also provides that "distribution services" are to include the "solicitation" of accounts. Platino contends that this is to be interpreted as assigning to Univision the responsibility of marketing. The principal flaw in this theory is that if the parties had intended to provide that Univision and not Platino were to be responsible for marketing, they would have stated so. Instead, they chose to have it the other way. Nor is it true that solicitation of accounts and marketing are the same. Marketing is a broad concept carrying with it a number of functions, such as the design of a marketing strategy and advertising style. The solicitation of an account is a functionally narrow enterprise that is limited to asking a potential client to sign up.

Next, Platino points to the alleged fact that, prior to the execution of the Distribution Agreement, Univision marketed Platino records. Platino claims this fact is "evidence of what the parties intended Univision's obligations under the 2005 [Distribution] Agreement to be." We do not agree. Even if Univision was engaged in marketing prior to the Distribution Agreement, it is clear that the parties could agree, as they did agree, to change this practice and to shift this responsibility to Platino.

In sum, Platino's efforts to show that paragraph 9.(d) does not mean what it very plainly says are unavailing. It is clear that paragraph 9.(d) assigns the sole responsibility for marketing to Platino. This requires no interpretation as this provision is unambiguous and clear.

Because Univision was not under a duty to market Platino's records, its failure to market the product was not a breach of the Distribution Agreement.

3. Platino Has Admitted That Univision Has Distributed Its Records

Platino contends that there are facts that show that Univision has failed to distribute its records.

Univision propounded three requests for admission that were framed as follows: "Admit that UNIVISION MUSIC did not fail to distribute PLATINO'S records during the calendar year 2006 [2007] [from January 1, 2008 to the present]." The response to each of these requests was "Admit."

"Any matter admitted in response to a request for admission is conclusively established against the party making the admission in the pending action, unless the court has permitted withdrawal or amendment of that admission under Section 2033.300." (Code Civ. Proc., § 2033.410, subd. (a).) "If a response to a request for admission is unambiguous, and is not subject to different meanings, the matter admitted is conclusively established." (*Monroy v. City of Los Angeles* (2008) 164 Cal.App.4th 248, 260.)

Platino seeks to sidestep the foregoing rule by contending that a "response to a request for admission is binding only to the extent required by a literal reading of the request." If we are to understand this as saying that an admission operates only to admit what was requested and nothing else, we of course agree. The pertinent requests for admission in this case were quite clear, as was the portent and significance of the admissions. Platino admitted that Univision did not fail to distribute its records in the indicated years.

Platino points to evidence that another distributor, Veros Music, never received from Univision any of Platino's records. While it is true that other evidence may be consulted to explain an admission (*Monroy v. City of Los Angeles, supra,* 164 Cal.App.4th at p. 260), a court "cannot use such evidence to contradict the plain meaning of a response to a request for admissions." (*Ibid.*) In any event, it verges on the frivolous to claim that because one of many distributors did not receive from Univision Platino records, Univision wholly failed to distribute the records.

Platino contends that its president, Mitchell, interpreted the requests for admission as asking whether Univision distributed Platino records in the years in question, and not whether "Univision fulfilled all of its distribution obligations . . . ." One would think that the admission that Univision did not fail to distribute Platino records is really all that matters, whatever Mitchell's subjective views may have been. As one text puts it, citing *McSparran v. Hanigan* (E.D.Pa 1963) 225 F.Supp. 628, 637, the response to a request for admission is usually crafted under the direction and supervision of counsel, who has full professional realization of its significance. (1 Hogan & Weber (2005) Cal. Civil Discovery, § 9.20, p. 9-55.)

The fact of the matter is that Platino's admissions are binding and conclusive. (Code Civ. Proc., § 2033.410, subd. (a).)

4. Platino's President Admitted That Univision's Accounting Was Complete and Accurate

Platino contends that Univision "failed to show facts which negate Platino's claim that Univision failed to account to it."

The contrary is true. Mitchell testified in his deposition that Platino regularly received royalty reports from Univision and that there was never a time that a royalty report did not arrive as scheduled. He also testified that there "has never been any disputes" between Platino and Univision about royalties and, when asked whether Platino has been paid everything that was due from Univision, his answer was "[o]f course."

Platino's attempts to get around Mitchell's admissions are not successful. The fact that Univision employee Rakauskas did not check the veracity of sales figures or "test the veracity of the underlying royalty statements," as Platino contends, means nothing as there is no indication that the sales figures and royalty statements were in fact inaccurate. According to Mitchell's testimony, they were accurate. The fact that at one point in 2008 the monthly sales report was discontinued for a time is also of no moment since the monthly reports were furnished as a matter of courtesy only. The royalty reports required under the Distribution Agreement were quarterly and, as Mitchell testified, they always arrived on time.

5. Univision Did Not Breach the Implied Covenant of Good Faith and Fair Dealing

While it is true that the implied covenant of good faith and fair dealing is not predicated on the breach of a specific, express provision of the contract (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 373), an implied covenant of good faith and fair dealing cannot contradict the express terms of a contract (*Storek & Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44, 55). Platino claims that Univision breached the implied covenant when it failed to market Platino's products aggressively enough. But as we have seen, under the Distribution Agreement marketing was the sole responsibility of Platino and not Univision. The implied covenant of good faith and fair dealing cannot be used to vary this express term of the Distribution Agreement.

Platino contends that this implied covenant "requires that if Univision agreed to distribute Platino's products, it must do so in good faith." The implication is that Univision could have distributed more of Platino's products. Yet, Platino wholly fails to produce any evidence that Univision did not distribute as much of Platino's product as it could have distributed. There is not a single reference to how many Platino records Univision distributed and how many it could have, but failed to, distribute. This argument fails because there is simply no evidence to support it.

Next, Platino contends that the implied covenant was breached because "Univision took deliberate and conscious actions to destroy Mitchell's livelihood because he testified against them regarding the payola scheme." There is no citation to the record to support this claim, which is reason enough to disregard it. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Yeboah v. Progeny Ventures, Inc.* (2005) 128 Cal.App.4th 443, 451.) Be that as it may, we are left to wonder what those "deliberate and conscious actions" were, especially in light of Mitchell's testimony that Platino received from Univision everything to which it was entitled. In short, the argument fails again because there is no evidence to support it.

We find no violation of the implied covenant of good faith and fair dealing.

6. The Complaint Fails to State Facts Sufficient to Constitute a Cause of Action for Duress[4]

Platino's fifth cause of action is entitled "civil extortion" and alleges that the defendants "withheld monies belonging to [Platino], and intentionally failed to distribute and market [Platino's] records, all for the purpose of obtaining the silence of Mr. Mitchell . . . . [The defendants' acts] were done to obtain a pecuniary advantage over [Platino], and to use this advantage as a threat to keep Mr. Mitchell silent as to [the defendants'] illegal and wrongful conduct . . . ." Platino explains in its brief that the money

---

[4] The defect that the complaint does not state facts sufficient to constitute a cause of action is not waived by a failure to demur (Code Civ. Proc., § 430.80, subd. (a)); this defect may be raised for the first time on appeal (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 958, p. 372).

that was allegedly withheld was the reduction of the monthly advances from $200,000 to $150,000 by the July 17, 2006 amendment to the Distribution Agreement.

We requested that the parties submit supplemental briefs on the question whether there is a cause of action for "extortion." The parties have done so.

Appellants appear to contend that the supposed civil action for extortion follows the contours and substance of the crime of extortion. We do not agree that this is the case. The law does recognize, however, that property obtained from a person by means of an illegal act may be recovered in a civil action. This doctrine is referred to as "duress" (*Leeper v. Beltrami* (1959) 53 Cal.2d 195, 203), or "duress of goods" or "business compulsion" (*Sistrom v. Anderson* (1942) 51 Cal.App.2d 213, 220). While duress is sometimes referred to in a civil context as extortion (*Fuhrman v. California Satellite Systems* (1986) 179 Cal.App.3d 408, 426), in a civil context extortion has different elements than the crime of extortion. In a civil context, extortion is "essentially a cause of action for moneys obtained by duress, a form of fraud." (*Ibid.*) While the label varies, as the cases show, the essential element of the tort is that the defendant has obtained the plaintiff's property or money by some form of duress. We will refer to the cause of action as one for duress.

There are two aspects of the doctrine of duress that are lacking in this case.

First, the remedy for duress is restitution. That is, duress as a civil wrong empowers the plaintiff to recover property, whether real or personal, that the defendant has obtained wrongfully from the plaintiff. "Duress, in the early common law, embraced within its scope only such acts or threats as resulted from fear of life, the loss of a member, mayhem and imprisonment." (*Sistrom v. Anderson*, *supra*, 51 Cal.App.2d at p. 220.) From this beginning, duress was expanded to the "tortious seizure or detention of property," which would be restored to the plaintiff. (*Ibid.*) Our Civil Code specifically recognizes the "unlawful detention" of property as a form of duress. (Civ. Code., § 1569.)[5]

---

[5] "DURESS, WHAT. Duress consists in: [¶] 1. Unlawful confinement of the person of the party, or of the husband or wife of such party, or of an ancestor, descendant, or adopted child of such party, husband, or wife; [¶] 2. Unlawful detention of the property of any such

The cases recognizing duress as a civil wrong involve situations when the plaintiff parted with money or other valuables under duress and then sought to recover the sum or valuable surrendered to the defendant. (E.g., *Leeper v. Beltrami, supra*, 53 Cal.2d at p. 202 [plaintiff seeks recovery of sum paid in response to tortious threat to foreclose]; *London Homes, Inc. v. Korn* (1965) 234 Cal.App.2d 233, 239 [plaintiffs paid $650 per acre more than originally agreed]; *Young v. Hoagland* (1931) 212 Cal. 426, 428 [plaintiff seeks to recover sums paid as a result of an illegal assessment by a corporation's board of directors].)

In this case, Platino cannot seek restitution because it did not pay Univision anything. The fact that the advance was decreased from $200,000 to $150,000 may give rise to a claim for damages but this is not the basis for a restitutionary claim. In essence, restitution functions to restore to the plaintiff the """value of what he parted with.""" (*Dunkin v. Boskey* (2000) 82 Cal.App.4th 171, 198.) Because Platino did not "part" with any property it owned, including money, there is nothing to restore.

The second characteristic of duress that is absent here is that the defendant's act that causes the plaintiff to part with something of value must be unlawful. (*Burke v. Gould* (1894) 105 Cal. 277, 282; *McTigue v. Arctic Ice Cream Supply Co.* (1912) 20 Cal.App. 708, 719.) As respondents point out, there are some cases that speak of a "wrongful" act when it comes to duress (e.g., *Rich & Whillock, Inc. v. Ashton Development, Inc.* (1984) 157 Cal.App.3d 1154, 1158) but we need to parse this point too finely as nothing that respondents did was either unlawful or wrongful.

All that Univision is charged to have done in this case is to reduce the advance and, according to the allegation of the complaint, failed to distribute and market Platino's records. These acts and omissions, if true, may amount to a breach of contract, but they are neither unlawful nor wrongful

In sum, Platino cannot state facts sufficient to constitute a cause of action for duress.

---

person; or, [¶] 3. Confinement of such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harrassing or oppressive." (Civ. Code, § 1569.)

7. The Declaratory Relief Claim Is Without Merit

The cause of action for declaratory relief seeks a declaration that the July 17, 2006 amendment to the Distribution Agreement is of "no force or effect in that the Amendment was entered into only because of the failure of Defendant Univision to honor the express language of the Distribution Agreement, and the Covenant of Good Faith and Fair Dealing contained in said agreement, and the civil extortion of Defendants."

We have explained that, as a matter of law, Univision did not breach the Distribution Agreement nor the covenant of good faith and fair dealing. We have also found that there is no such civil wrong as "civil extortion" and that Platino cannot state facts sufficient to constitute a cause of action for duress. The claim for declaratory relief is therefore without merit as a matter of law.

DISPOSITION

The judgment is affirmed.

FLIER, J.

We concur:

BIGELOW, P. J.

RUBIN, J.